BRIEF OF APPELLANT

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

See Vol. 1 3491

No. 22749

HOWARD ELECTRIC CO., a Colorado Corporation,
Appellant,

vs.

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS LOCAL UNION NO. 570 and INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS,
Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA, TUCSON DIVISION

GORSUCH, KIRGIS, CAMPBELL, WALKER AND GROVER

Bennett S. Aisenberg
1900 Security Life Bldg.
Denver, Colorado 80202

Attorneys for Appellant

EASTWOOD PRINTING CO. • 2854 LARIMER STREET • DENVER, COLORADO

INDEX

CASES CITED

CASES CITED (CONTINUED)

PAGE

STATUTES

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

No. 22749

HOWARD ELECTRIC CO., a Colorado Corporation,
Appellant,

vs.

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS LOCAL UNION NO. 570 and INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS,
Appellees.

BRIEF OF APPELLANT

STATEMENT OF JURISDICTION

Appellant in its Complaint bases jurisdiction under Section 301 of the Labor Management Relations Act of 1947 as amended (29 U.S.C. 163) which reads as follows:

> "Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties."

STATEMENT OF CASE

This matter arises upon the United States District Court for the District of Arizona granting Appellees' (Defendants below) motion to stay proceedings pending arbitration. Plaintiff's complaint in essence alleges a collective bargaining agreement between the parties dated June 20, 1966 containing a provision (Article I, Sec. 4) that there shall be no stoppage of work either by strike or lockout because of any dispute over matters relating to this agreement. Said complaint futher alleges that on or about August 31, 1967 Defendants ordered and coerced employees of Plaintiff to cease working for Plaintiff and in accordance with same, these employees did in fact walk off the job and ceased working for Plaintiff, and as a result Plaintiff has been damaged.

Defendants in making their motion for a stay of proceedings specifically admit the allegations of the complaint as being true (see page 2 of Defendants memorandum filed with Defendants motion for stay of proceedings). The United States District Court granted Defendants motion for a stay of proceedings pending arbitration. It is from this order that Appellant (Plaintiff below) takes this appeal.

QUESTION INVOLVED

WAS THE ORDER OF THE DISTRICT COURT PROPER IN RULING THAT IT SHOULD NOT DECIDE THIS CASE PENDING ARBITRATION?

ARGUMENT

THE DISTRICT COURT ERRED IN HOLDING THAT THE QUESTION OF VIOLATION OF THE NO STRIKE CLAUSE IN THE COLLECTIVE BARGAINING AGREEMENT WAS AN ARBITRABLE ISSUE.

The general rule in cases where damages for breach of the "no-strike" clause is in issue is that such a matter is not arbitrable and that the United States District Court has jurisdiction over such matters under Section 301 of the Labor Management Relations Act, as amended (29 U.S.C. 163). See *Atkinson v. Sinclair Refining Co.*, 370 U.S. 238, 8 L. Ed. 2d 462 (1962) and cases cited at page 13 of this Brief. The Appellees' position below was that the present case falls directly within the fact situation of *Drake Bakeries, Inc. v. Local* 50, *American Bakery and Confectionery Workers International, AFL-CIO*, 370 U.S. 254, 8 L.Ed. 2d 474 (1962) which granted a stay of proceedings pending arbitration. It is the position of the Appellant that the current case differs diametrically and dramatically from the *Drake* case. It is here maintained that the *Drake* case must be limited to the specific fact situation of this case, and in fact, the United States Supreme Court so stated in its decision.

The facts in the *Drake* case are as follows: On December 16, 1959, the Company notified the Union and its employees that the employees would be required to work on Saturday, the day following Christmas and New Years, instead of the day before. The Saturday after New Years only 26 out of 190 employees showed up for work and the Company, based on this fact situation, filed a complaint for damages in the United States District Court alleging that the Union had instigated a strike in violation of the

no strike clause. The Union filed a motion to stay proceedings and in its affidavit in support thereof specifically denied that the Union had encouraged or instigated a strike.

The United States Supreme Court decided the *Drake* case on the particular arbitration clause in the contract, i.e. on the broadness of the language itself. The clause is cited here for convenience.

> "*Article V — Grievance Procedure*
>
> The parties agree that they will promptly attempt to adjust all complaints, disputes or grievances arising between them involving questions of interpretation or application of *any clause or matter covered by this contract or any act of conduct or relation between the parties hereto directly or indirectly.*" (Emphasis supplied)

How different this clause is from the clause in the present contract will be pointed out later in this brief. Note, however, the underlined language. The Court specifically mentions this at page 258 of 370 U.S. where it states:

> "Article V does not stop with disputes 'involving questions of interpretation or application of any clause or matter' covered by the contract. The adjustment and arbitration procedures are to apply to all complaints, all disputes and all grievances involving any act of either party, or any conduct of either party, or any relation between the parties, directly or indirectly. The company asserts there was a strike by the union in violation of the no-strike clause. It, therefore, has a 'complaint' against the union concerning the 'acts' or 'conduct' of the union. There is also involved a 'dispute' between the union and the company, for the union denies that there was a strike

> at all, denies that it precipitated any strike, denies that the employees were obligated under the contract to work on that January 2, and itself claims that the employer breached the contract in scheduling work for the holidays."

As pointed out in the language above, in the *Drake* case there was a true dispute as to whether there even was a strike, i.e. whether the employees were even supposed to be on the job on the day in question in that this was a Saturday, January 2, the day immediately following New Year's Day. The Court specifically states that the violation of the no-strike clause was a "complaint" rather than a "dispute" against the union concerning the acts or conduct of the union. The word "dispute" as found in Article V was involved also, in that the union denied there was a strike at all. Also it might be pointed out that the no-strike clause, Article V, has a specific provision requiring the company to arbitrate disciplinary action against strikers.

Furthermore, the United States Supreme Court relies very heavily on the fact that the company had shown its understanding of the arbitration clause a mere four months before, by requesting arbitration on a matter involving a strike, i.e. the employer by past practice had committed itself to a course of conduct. The Court said at page 260 of 370 U.S.:

> "It would appear, then, that the company, just four months earlier in 1959, considered the fundamental matter of a union-led strike was a dispute to be arbitrated under the provisions of the contract."

Finally, in *Drake* this was merely a one-day strike, if in fact it was a strike at all; not a permanent strike as in the present case.

Thus, it is clear that the *Drake* case must be limited to its particular facts and the Supreme Court so states at pages 265 and 266 of 370 U.S.:

> "*We do not decide in this case that in no circumstances would a strike in violation of the no-strike clause contained in this or other contracts entitle the employer to rescind or abandon the entire contract or to declare its promise to arbitrate forever discharged or to refuse to arbitrate its damage claims against the union.* We do decide and hold that Article V of this contract obligates the company to arbitrate its claims for damages from forbidden strikes by the union and that there are no circumstances in this record which jusitfy relieving the company of its duty to arbitrate the consequences of this one-day strike, intertwined as it is with the union's denial that there was any strike or any breach of contract at all. . . . This question, as well as what result will best promote industrial peace, can only be answered in the factual context of particular cases. Here, the union claims it did not call a strike and that the men were not bound to work on January 2, basing its claim upon years of past practice under the contract. The dispute which this record presents appears to us to be one particularly suited for arbitration, if the parties have agreed to arbitrate. We hold that they did so agree and will hold the company to its bargain." (Emphasis supplied)

Thus, it can be seen that *Drake Bakeries* involved a very broad arbitration clause which the Court interprets as applying to a suit for breach of the "no-strike clause."

Let us now look at the case at bar. The arbitration clause in question is Article I, Section 4:

> "There shall be no stoppage of work either by

strike or lockout because of any proposed changes in the Agreement or disputes over the matter relating to the Agreement. All such matters must be handled as stated therein."

Note the great, great difference between the clause in the present case and the *Drake Bakeries'* clause. The *Drake* clause states, all complaints, disputes or grievances arising between them involving questions of interpretation or application of any clause or matter covered by this contract, or any act or conduct or relation between the parties hereto, directly or indirectly. It is hard to conceive of an arbitration clause of broader application than that in *Drake.* The clause in the case at bar deals only with disputes and thus the question which must be decided by this Court is, "Is a stoppage of work or strike a dispute under the present contract?" If it is, it must go to arbitration. If a strike is not a dispute as used in Section 4, then it may be heard by the Federal Court under Section 301 of the Labor Management Relations Act of 1947, as amended, and there is no need for arbitration.

The Appellant maintains that to say a strike is a dispute under this clause is to totally misread this clause. In *Drake,* there was a broad arbitration clause and later in the contract a no-strike clause. This violation of the no-strike clause falls within the language "application of any clause". In this contract, the very no-strike clause is in the same sentence as the clause setting up arbitration, and is the consideration or quid pro quo for the arbitration clause. To quote the oft quoted language of Justice Douglas in *Textile Workers' Union of America v. Lincoln Mills of Alabama,* 353 U.S. 448, 1 L.Ed.2d 972 (1957)

"Plainly, the agreement to arbitrate grievance disputes is the quid pro quo for an agreement not to srike."

How much more conclusive this is when the very arbitration clause itself contains the no-strike language.

But further, holding that a strike is a dispute under the wording of this clause renders the clause absolutely meaningless. It is an example of circular reasoning and begs the premise. The clause in question clearly considers a dispute as separate from a strike in that it says there shall no no strike because of a dispute. The clause acknowledges disputes will exist and provides in the same sentence that such disputes will not permit strikes to exist. It would be contradictory to interpret a strike as a dispute. If a situation constitutes a dispute, then we should be able to substitute the situation for the word "dispute" and not render the sentence an absurdity. Let us go through a few examples of this. It is clear that the discharge of an employee can be a dispute as could be a unilateral change in wages by the company. Let us then substitute the particular dispute for the word "dispute", i.e.

> There shall be no strike because of the discharge of an employee.

This makes sense.

> There shall be no strike because of a unilateral change in wages.

This makes sense, but

> There shall be no strike because of a strike.

This is meaningless and in fact it is a contradiction on its own face.

The very fact that the no-strike clause and the word "dispute" are mentioned in the same sentence shows that one does not include the other. The Latin expression "expressio unius exclusio alterious" (the mention of one thing implies the exclusion of the other) would apply here.

Under this clause, the very purpose of the disputes or arbitration clause is to avoid strikes or work stoppages. This is inherent in the very clause, i.e. there shall be no strike because of any dispute. To allow the employees to strike would be to encourage an illegal strike which is what the contract, by setting up an arbitration clause, tried to prevent. Obviously, in this case the union had a dispute over some phase of wages, hours or working conditions. The onus under the disputes clause is for the Union to take the dispute to arbitration. This it did not do, but there was a strike in violation of the contract. To allow the Union to do this is to encourage it not to invoke the arbitration or dispute procedure, but to commit a work stoppage or strike contrary to the very purpose of the disputes clause, which is to encourage arbitration. As the Supreme Court said in the *United States Steel Workers v. Warrior and Gulf Navigation Co. case,* 363 U.S. 574, 4 L.Ed. 2d 1409, (1960) at page 1417 of 4 L.Ed. 2d:

> "The grievance procedure is, in other words, a part of the continuous collective bargaining process. It, *rather than a strike,* is the terminal point of a disagreement." (Emphasis supplied)

In the present case, unlike in the Drake case, the Union repudiated the very disputes procedure it now seeks to invoke. The Supreme Court in *Drake* says at pages 262 and 263 of 360 U.S.:

> ". . . and in determining whether one party has so repudiated his promise to arbitrate that the other party is excused *the circumstances of the claimed repudiation are critically important.* In this case the Union denies having repudiated in any respect its promise to arbitrate, denies that there was a strike, denies that the employees were bound to work on January 2 and asserts that it was the company itself

> which ignored the adjustment and arbitration provisions by scheduling holiday work.'' (Emphasis supplied)

No such circumstances are present in the instant case. The Union had a dispute to be taken to arbitration. This it did not do, but it engaged in an illegal strike in violation of the contract. No such mitigating circumstances as are present in *Drake* have been shown in our case nor indeed are any present.

Thus, the critical question the Court must answer is, did the parties intend a strike to be a dispute as set out in Article I, Section 4? That it may not be is clearly shown by the case of *Atkinson v. Sinclair Refining Company,* supra, pg. 3, decided the same day as the *Drake Bakeries* case. In *Atkinson,* the Court held that the abritration clause was a limited one and thus did not compel arbitration.

> ''Arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit.'' 8 L.Ed. 2d at page 466.

It is here maintained that the strike in the present case, based on the restricted arbitration clause, was in no wise intended to be arbitrated, and hence this case falls outside the limited fact situation of the Drake case.

The no-strike pledge actually was the ''quid pro quo'' for the agreement to arbitrate in the instant case, unlike the situation that prevailed in the *Drake* case. This point is established by the language of Section 9 of Article I which demonstrates that it was never the parties' intention

to submit questions of breaches of the no-strike, no lockout pledge to settlement through the arbitration process.

Section 9 of Article I sets forth a condition precedent to any arbitration which cannot possibly be fulfilled in a situation involving a stoppage of work either by strike or by lockout. Section 9 provides:

> "Section 9. When any matter in dispute has been referred to conciliation or arbitration for adjustment, the provisions and *conditions prevailing prior to the time such matters arose shall not be changed or annulled.*" (Emphasis supplied)

The "conditions prevailing prior" to the time a work stoppage, strike or lockout arises are the continuation of work on the project without strikes. Section 9 requires that such conditions (the continuation of work on the project without interruption) "shall not be changed or annulled" while arbitration proceeds. It is impossible to hold "conditions prevailing prior" to the time a work stoppage, strike or lockout arises in an unchanged or unannulled status. As soon as the work stoppage occurs everything changes on the job or the work is lost by the employer as happened in this case. Therefore, it is impossible to include work stoppages, strikes or lockouts within the meaning of the terms "matter in dispute" or "dispute" as used in Section 9 and Section 4 of Article I without rendering the rest of those provisions completely meaningless and absurd. Also, if the language of Section 9 imposing the requirement and condition that the "conditions prevailing prior to the time such matters arose" is to be awarded any meaning or effect whatsoever then the only conclusion that one can come to if it is desired to include the terms "work stoppage, strike or lockout" within the meaning of the term "dispute" is that the absence of a strike or work

stoppage is an essential condition precedent to invoking arbitration. This is also the clear intendment of Article II, Section 15, paragraph 2 of the parties' agreement wherein it states in pertinent part as follows:

> "In the event of disputes or trouble arising on any job where workmen are employed hereunder, the workmen shall remain at their work and the shop steward shall notify the business manager of the union. Upon receipt of such complaints, the business manager shall proceed to the job and use his best efforts to adjust the trouble at the earliest possible time."

Since it is obviously impossible in strike or work stoppage situations to prevent change or annulment of the conditions that existed prior to the strike or work stoppage, it is the Appellent's position that it is clear from the language of Section 9 and Section 4 of Article I and Section 15 of Article II that it was never the parties' intention to submit questions concerning breach of the no-strike no-lockout pledge to the arbitration process. To read these provisions otherwise would, in effect, render Section 9 meaningless and eliminated from the agreement.

It is here contended that this case falls directly within the reasoning of *International Union, United Automobile Aircraft, etc., et al. v. Benton Harbor Malleable Industries,* 242 F. 2d 536 (6th Cir. 1957), wherein the arbitration clause read as follows:

> "1. Shall difference arise between the Company and the Union as to the meaning and application of this Agreement, or should any local trouble arise, an earnest effort shall be made to settle such differences, and it is agreed by the Union that there shall be no strike, slowdown or stoppage of work on the part of the Union or its members and there shall be no lock-

out on the part of the Company during the term of this contract. The parties shall in all instances resort to the following steps of the grievance procedure.''

The Court at page 540 stated as follows:

''Article III, paragraph 1, contains an unequivocal, unconditional obligation not to strike or engage in a work stoppage during the term of the contract. It recognizes that a 'difference' might arise between the Company and the union which, if not settled, would lead to a strike. It looks to a settlement of that difference by use of the grievance procedure, but there is nothing in that paragraph which relieves the unions of their unconditional obligation not to have a strike. The 'difference' or 'grievance' is to be arbitrated to a final conclusion, but while it is being arbitrated and regardless of how it is eventually decided and terminated, there is to be no strike. The thing to be arbitrated is the 'difference' or 'grievance', not the right to strike or any claimed justification for the strike. There was no right to strike. The arbitration called for by this paragraph of the contract was to be used instead of a strike not to determine whether the strike was justified after it had occurred. The right to strike was not an arbitrable issue under this paragraph of the contract.''

There are a myriad of other cases holding specifically that violations of the no-strike clause are not arbitrable. See: *Structural Steel & Ornamental Iron Assn. of New Jersey, Inc. v. Shopmens Local Union No.* 545, etc., 172 F. Supp. 354 (D NJ 1959); *Cuneo Press, Inc. v Kokomo Paper Handlers' Union No.* 34, 235 F. 2d 108 (7th Cir. 1956); *Harris Hub Bed & Spring Co. v. United Electrical, Radio & Machine Workers of America, et al.,* 121 F. Supp. 40 (M D PA 1954); *International Union United Furniture*

Workers of America v. Colonial Hardwood Flooring Co., 168 F. 2d 33 (4th Cir. 1948).

Other drastic differences between the present case and the *Drake* case occur. First, the union in the *Drake* case even denied this was a strike. The issue in that case was whether the employees were supposed to work on January 2. The question of the existence or non-existence of a violation of the no-strike clause was involved. In the present case, there is no question that a strike or work stoppage is involved. See Appellees' Memorandum, page 2, where Appellees admit for purposes of their Motion to Stay that there actually was a work stoppage or strike. See also affidavit of Horace Bounds filed with the Appellees' Motion wherein he states in his last clause that a work stoppage or a strike occurred (whether the Union instigated same or not is a question of fact to be determined later).

Further, as pointed out earlier, in *Drake* the Court specifically indicated it was relying heavily on the company's past practice of arbitrating matters relating to illegal strikes. This evidenced the company's understanding of the disputes clause. No such past practice occurred in the present case.

Appellees to succeed must show that this case falls within the particular fact situation of *Drake Bakeries.* Although the Appellee has maintained below that the present case contains the same fact situation as *Drake,* we believe it has been clearly pointed out that this is contrary to fact. The United States Supreme Court has continually held that arbitration is a matter of contract and a party cannot be compelled to arbitrate any dispute it has not agreed to submit. *U. S. Steel Workers v. Warrior and Gulf Navigation Co.,* supra, pg. 9.

In *Drake,* the arbitration clause is extremely broad, i.e. all complaints, disputes or grievances, or any act or conduct or relation between the parties directly or indirectly. In the present case, it is only disputes which can be arbitrated and the clause specifically says that there shall be no strikes because of such disputes. If the purpose of arbitration is to further industrial peace and harmony, whose interpretation better satisfies this concept, the Company's or the Union's? It is strongly maintained the Union position rather promotes industrial strife.

Further, the Drake case contained a past practice concept and also there was a fundamental question as to whether the one day absence by the employees was in fact a strike at all.

One further case should be discussed. At the hearing on the Appellees' motion staying proceedings, the District Court in its discussion felt the present case fell within the purview of *Los Angeles Bag Co. v. Printing Specialties, etc.,* 345 F. 2d 757 (9th Cir. 1965) decided by the Circuit Court of Appeals for the Ninth Circuit and thus ruled in favor of staying the proceedings pending arbitration. Since the District Court relied heavily on this case decided by the present Court, Appellant feels it advisable to endeavor to point out to this Court why it feels the *Los Angeles* case is wholly and fundamentally different from the present case. The facts of the *Los Angeles* case are as follows:

The employer discharged twelve employees based on its contention that these employees had engaged in a work stoppage in violation of the agreement. A clause in the contract, namely, Article I, Section 4 reads as follows:

> "In the event of any strike or stoppage *in violation of this agreement,* the company may discipline any employees' participation therein and any such disci-

pline shall not constitute a grievance within the meaning of Article II." (Emphasis supplied)

Thus when the employees filed a grievance, the employer refused to arbitrate, claiming Article I, Section 4 covered this matter and that there was no obligation to arbitrate. The employees, on the other hand, claimed:

(a) This was not a work stoppage since the supervisor had authorized them to leave work early because of working conditions where the men were working.

(b) If this was a work stoppage, it was not a stoppage in violation of the agreement as set out in Article I, Section 4.

Thus, in the Los Angeles case, the Union, (or employees) denied that a strike existed. In the present case, the Union has admitted throughout that a strike or work stoppage occurred (see page 2 of Appellees' memo brief and affidavit of Horace Bounds, last clause, wherein it states that a strike or work stoppage took place) although denying Union instigation.

The court then goes on to say that the employer has the right to assume as a matter of first instance that an unauthorized work stoppage occurred. However, if the employees challenge the employer's claim of unauthorized work stoppage by filing a grievance, then arbitration must be had.

The key words of the court are found at page 459.

"Employer's claim of unauthorized walkout, on its face was but a claim of alleged violation of the express provisions of Article I, Section 4, *that there*

should be no unauthorized walkout.'' (Emphasis supplied)

Note the court relies heavily on the phrase ''unauthorized walkout'' for it is only an unauthorized walkout that is not subject to arbitration under Article I, Section 4. Article I, Section 4 states: ''In the event of any strike or work stoppage in violation of this agreement'', i.e. an unauthorized strike or work stoppage. This, of course, is not our case for in our case it is *all* strikes or work stoppages, whether authorized or unauthorized, that are not subject to the disputes procedure.

Appellant agrees with the reasoning of the *Los Angeles* case. In that case, it was only matters relating to a strike in violation of the agreement which were not arbitrable under Article I, Section 4. The employees in that case denied there was a strike. Therefore, since there was a question as to whether there was a strike, or whether such a strike if there was one, was authorized or unauthorized, the matter had to go to arbitration. This is clearly not our case. The disputes clause in our case states: ''There shall be no stoppage of work either by strike or lockout, etc.''. Nowhere is the word ''strike'' or ''work stoppage'' modified by the phrase ''in violation of this agreement'' as in the *Los Angeles* case. It is not merely illegal or unauthorized strikes or work stoppages that are non-arbitrable in our case, but all strikes or work stoppages.

The court was worried in the *Los Angeles* case that the employer could emasculate the arbitration provision by unilaterally interpreting every action of the employees as a walkout or work stoppage. At page 759 it states as follows:

''. . . to sustain employer's contention would be to emasculate the arbitration provision of the contract

> whenever the employer saw fit to unilaterally interpret any action of the employees as a walkout or stoppage."

But that is not our case. Appellant is not unilaterally interpreting the action of the employees in not working as a strike or work stoppage. The appellees *admit* there was a strike or work stoppage, but merely question whether or not they instigated it. If the Union denied there was a strike or work stoppage in this case, we would have a different case and arbitration would have to be resorted to in order to resolve the question of whether a strike did in fact exist. But this the Union did not do because they could not in good faith deny same. They merely denied they instigated it. But whether this be a Union instigated strike, an employee instigated strike, a legal strike, an illegal strike, a wildcat strike, an economic strike, i.e., regardless of what kind of strike we have here, it falls within the wording of Article I, Section 4 of our contract which issues a blanket restriction against strikes or work stoppages of all kinds regardless of whether they are authorized or unauthorized, Union instigated or not. And further, as pointed out throughout this brief, the matter of strike or work stoppage is not subject to the disputes procedure.

A further difference must be pointed out. The Los Angeles contract contains the following article:

> "Article II, Grievance and Arbitration. Section 2. Issues subject to the grievance procedure are limited to differences arising out of the interpretation, application or alleged violation of any of the express provisions of this agreement."

Thus, any question regarding the interpretation or application of any provision must go to arbitration. There

was in that case a question regarding the interpretation and application of Article I, Section 4, i.e., was there a strike, was it authorized. Once again in our case there is no question that a strike or work stoppage occurred. In the present case, the District Court felt that since the Union denied that it instigated the strike, this matter should be arbitrated. It is interesting to note that the same claim was made in the *Drake* case as in the present case i.e. that the Union did not instigate the strike. But the Court in *Drake* did not even refer to this contention in rendering its decision. It decided the *Drake* case on the particular no strike clause in the *Drake* contract as pointed out earlier. Appellant submits that under the present contract, it matteres not whether the strike was Union instigated or not, for it is all strikes which are not subject to the disputes procedure. There is a blanket restriction against strikes regardless of who instigates them. That a non-Union instigated strike is still a strike is pointed out by the language of *Jeffery-DeWitt Insulator Co. v. N.L.R.B.*, 91 F.2d 134 (4th Cir. 1957).

Thus, the court in the *Los Angeles* case correctly determined that if the Union raises the issue of whether there was a strike, and whether if there was, it was authorized, this must be arbitrated, because of the wording of Article I, Section 4 of the Los Angeles contract which distinguishes between illegal and legal strikes. But in the present contract there is no such distinction and, hence, once a strike or work stoppage occurs (as admitted by the Union), then all matters surrounding same are not a subject for arbitration and must be decided by a Federal Court under the reasoning as set forth in this brief.

Finally, there is a good question as to whether a Board of Arbitration has even the power to award dam-

ages, so fundamental to the Company's remedy in this action. See *Refinery Employees Union v. Continental Oil Co.*, 368 F.2d 447 (5th Cir. 1959) where the Court held that the abitrator had no power to assess damages absent a clause allowing him to so do. This would render the Employer's entire action meaningless if the Arbitration Panel had no right to assess damages — the crux of the Company's remedy.

CONCLUSION

For the reasons stated in this Brief, Appellant respectfully prays that the order of the United States District Court be overruled and that this Court enter its order ordering the United States District Court to hear this case in its entirety.

Respectfully submitted,

Gorsuch, Kirgis, Campbell, Walker and Grover

Bennett S. Aisenberg
1900 Security Life Bldg.
Denver, Colorado

Attorney for Apppellant